(2)

Supreme Court, U.S.
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No. 95-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Petitioner,

v.

U.S. PHILIPS CORPORATION,
NORTH AMERICAN PHILIPS CORPORATION and
N.V. PHILIPS GLOEILAMPENFABRIEKEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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October 30, 1995

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the courts of appeals are powerless to invoke judicial estoppel or otherwise deal with a litigant's duplicity merely because the appeal arose under 28 U.S.C. § 1292(b).

RULE 29.6 STATEMENT

The parents and subsidiaries of Respondents U.S. Philips Corporation, North American Philips Corporation and N.V. Philips Gloeilampenfabrieken, other than those that are wholly owned, are listed below:

Famar Fueguina Sociedad Anónima
Electric Lamp Manufacturers (Australia) Pty. Limited
Medical Applications Pty. Limited
Telekabel-Fernsehnetz Region Baden Betriebsgesellschaft m.b.H.
Telekabel-Fernsehnetz Graz Betriebsgesellschaft m.b.H.
Telekabel-Fernsehnetz Klagenfurt Betriebsgesellschaft m.b.H.
Telekabel Wien Aktiengesellschaft
Telekabel-Fernsehnetz Wiener Neustadt/Neunkirchen Betriebsgesellschaft m.b.H.
Neutronics Electronic Industries Holding Gesellschaft m.b.H.
Payer-Lux Verwaltungsges. m.b.H.
ACEC Lighting
Bedrijvencentrum Regio Brugge
Philips Coordination Center
Cable and Wire Assemblies
CWA-Immobiliën
European Development Center
Europese Maatschappij voor fabricage en verkoop van gloeilampenonderdelen "EMGO"
IBLIS FILMS
International Creative Digital Image
Philips Interactive Media Centre
Philips Matsushita Battery Corporation

Pastel
P.D.G. & Partners
Fonobras-Distribuidora Fonografica Brasileira Ltda.
Origin C&P Services Brasil Participaçoes Ltda.
Peterco do Nordeste Produtos Elétricos S.A.
Philips Automotive Lighting Hubei Co., Ltd.
Beijing Philips Audio/Video Corporation
Car Audio Electronics (China) Company Limited
Philips and Sanye Passive Components No. 1 Co., Ltd.
Philips Consumer Electronics Co. of Suzhou, Ltd.
Philips Domestic Appliances and Personal Care Company of Zhuhai SEZ, Ltd.
Feidong Lighting Company, Limited
Changshu Philips Ferrite Co., Ltd.
Hua Fei Colour Display Systems Company, Ltd.
Nanjing Huapu Electronics Company, Ltd.
Philips and Sky Medical Systems Nanjing Ltd.
Shenzhen Shen Fei Plastics and Metalware Company, Limited
Advanced Semiconductor Manufacturing Corporation of Shanghai
Philips & Yaming Lighting Co. Ltd.
Industria Andina de Iluminación S.A. "INADISA"
Bang & Olufsen A/S
Origin/C&P Denmark A/S
El Nasr Company for Electrical and Electronic Apparatus (NEEASAE)
PEC Musiikkitukku Oy
Valaisinpaja Oy
Apogée Communications S.A.
77, Centelec S.A.
Cinea S.A.
COGEDEP, Cie Générale Européenne de Distribution et d'Edition Phonographique S.A.
Le Consul S.A.
Experdata S.A.

INFOGRAMES
Société Industrielle Lenzi
Oui FM S.A.
La Radiotechnique
Ryan Jones S.A.R.L.
Société d'Etudes et Réalisations Nucléaires "Sodern"
Bankgeschäft Heinrich Behncke GmbH
CeQuadrat, Gesellschaft für Vertrieb von Soft- und Hardware G.m.b.H.
Euroventures Deutschland GmbH & Co. KG
Speziallampenfabrik Dr. Fischer GmbH
AFG Elektronik GmbH
Grundig Autoradio-Entwicklungs GmbH
Firmenverband zur Förderung der beruflicher Weiterbildung ffw GmbH
Grundig-Gildemeister Automation GmbH
Grundig Leasing GmbH
Grundig Multimedia Solutions (GMS) GmbH
GRUNDIG Aktiengesellschaft
GRUNDIG Elektrogeräte-GmbH
Grundig E.M.V. Elektro-Mechanische Versuchsanstalt Max Grundig GmbH & Co. KG
Grundig TV-Communications GmbH
Viscom Industrielle Bildverarbeitung GmbH
IR3 Video International GmbH
Kegler Lichttechnik
MGH Marketing Gesellschaft für Handelsservice mbH
Philips Mietsystem GmbH
PDO Professional Digital Optical Media GmbH & Co. K.G.
PDO Professional Digital Optical Media Verwaltungs GmbH
PhonoNet Gesellschaft für Handelsdienstleistungen m.b.H.
Philips Kommunikations Industrie Aktiengesellschaft
PMA Prozess- und Maschinen-Automation GmbH

prompt ! Medizinische Informationssysteme GmbH
Norddeutsche Seekabelwerke AG
SMST SubMicron Semiconductor Technologies GmbH
Sounds Plus Club Marketing GmbH
TECSO Automation GmbH
Car Audio Electronics (Hong Kong) Limited
Electronic Devices Limited
Mobile One Limited
Valen Limited
Philips Monitors Manufacturing Hungary Free Trade Zone Limited Liability Company
PolyGram Music Publishing Company Hungary LLC
PolyGram Records Hungary LLC
Hungarian Speaker Systems Manufacturing and Trading Limited Liability Company
Hind Lamps Limited
Origin Technology in Business (India) Limited
Punjab Anand Lamp Industries Limited
Philips India Limited
PolyGram India Ltd.
Philips Telecommunication Industries Limited
P.T. Philips Development Corporation
P.T. Grundig International Indonesia
P.T. Intra Philindokon
P.T. Philips-Ralin Electronics
Radioelectric Iran Ltd. (Public Joint Stock Company)
Silicon & Software Systems Limited
Philips Automation S.p.A.
Chapulin Edizioni Musicali S.r.L.
C.P. Factor S.r.1.
Music Direct Italia S.p.A.
Villa Sistemi Medicali S.r.1.
Denshi Media Services Company Limited
K.K. Keystone
Marantz Japan, Inc.
Polydor K.K.

Sanken-Airpax Co., Ltd.
Philips Sensor Technology Corporation
Sirius Music Publishing K.K.
Nihon Tecnico K.K.
Your Records K.K.
Daishin and Philips Lighting Autolamps Co., Ltd.
Polygram Ltd.
Philips Precision Korea, Ltd.
Light Incorporated and Trading S.A.L.
Binafron Telecommunications Sdn. Berhad
Electronic Systems (Malaysia) Sdn. Bhd.
Malaysian Lamps Sendirian Berhad
Philips and JVC Video Malaysia Sdn. Bhd.
Semiconductor Miniature Products (M) Sdn. Bhd.
Zaw-Tech (Malaysia) Sdn. Bhd.
Origin C & P Mexicana, S.A. de C.V.
Compañía de Vidrio Industrial, S.A. de C.V.
Maroc Lumière Industrie
Manufacture Nationale pour la Réfrigération et l'Electronique "MANAR"
Advanced Metal Forming B.V.
Advanced Metal Forming C.V.
ASM Lithography Holding N.V.
Berlo Service Group B.V.
BSO/Beheer B.V.
CDi Partner B.V.
ConNova Holland B.V.
Centre for Quantitive Methods CQM B.V.
Flat Panel Display Co. (FPD) B.V.
Icotel International B.V.
Interactive Entertainment Fund C.V.
Bank Mendes Gans N.V.
Meteor Classics B.V.
Micro Scope B.V.
Motown Entertainment Nederland B.V.
MPC Hilversum B.V.

Music Plus v.o.f.
Noble Europe B.V.
Origin/C&P Nederland v.o.f.
PDO Professional Digital Optical Media B.V.
PDO Professional Digital Optical Media C.V.
PolyGram N.V.
Pyton Communications Services B.V.
Record Service Benelux v.o.f.
SPaSE Holding B.V.
Telematica Transacties B.V.
TeleSelect Nederland B.V.
Teleworld Holding B.V.
United and Philips Communications B.V.
New Zealand Electric Lamp Manufacturers Limited
Fluorescent Lamp Partnership
Associated Electronic Products (Nigeria) Limited
PPC (Philips Projects Centre) Limited
Music Service Oslo A/S
TV Torget A/S
Philips Electrical Industries of Pakistan Limited
Polycosmic Records Incorporated
Philips Consumer Electronics Industries Poland Sp.z.o.o.
Grundig Polska Sp.z.o.o.
Philips Matsushita Battery Poland S.A.
Blaupunkt Auto Radio Portugal Lda.
CENDI - Produtos Multimédia, S.A.
Grundig Auto-Radio Portugal Lda.
NACIONALIS - Importao e Exportao, Lda.
Origin C P Portuguesa (Tecnologias de Informaçao), Lda.
Philips Sistemas Telecomunicacoes, Ltda.
Star Invest Limited
Philips Medical Systems Services Closed Joint Stock Company
PolyGram A.O.
Velt Open Joint Stock Company

Signal Telecom
Consolidated Lamp Manufacturers (Pty) Ltd.
Philips Electronics (South Africa) (Proprietary) Limited
Philips Electronics Holdings Limited
Compañia General Española de Electricidad
Sogepaq Distribuçion S.A.
Total Distribuçion S.A.
Electro Válvula S.A.
Arigram Record Service AB
Connova Produktkonsult AB
Kjell Gurfors Internkommunikation AB
Origin/C&P Sweden AB
Stockholm Records AB
Stockholm Songs AB
TVExtra AB
Virgin Sonet Försäljnings AB
Discorack-Nco AG
Elevite AG
Glühlampenfabrik GLORIA AG
Decca Records Taiwan Ltd.
Featron Technologies Corporation
PolyGram Music Publishing Ltd.
Taiwan Semiconductor Manufacturing Company Limited
Windmill Company Ltd.
Société Tunisienne d'Eclairage
Systel
Turk Philips Aydinlatma Sanayi ve Ticaret Anonim Sirketi
Birlesik Aydinlatma Sanayi ve Ticaret Anonim Sirketi
Turk Philips Ticaret Anonim Sirketi
Turk Philips Sanayi Anonim Sirketi "Philisan"
Adrawing Ltd.
Africa Fete Ltd.
Alto Music Ltd.
BITS Corporation Limited

CD-I Training Limited
Cedarwood Music Ltd.
Croxton Investments Limited
Debonaire Music Ltd.
DEF American Ltd.
Delphic Card Systems E.E.I.G.
Dominic Music Ltd.
Eros Music Systems Ltd.
F F R R Records Ltd.
Folklore Ltd.
Gee Street Music Ltd.
Gee Street Records Ltd.
Go ! Holdings Ltd.
Gooding Microwave Technology Ltd.
Gralto Music Ltd.
Grundig Satellite Communications Ltd.
Kempston [1987] Limited
Lavington Investments Limited
Philips Lighting Manufacturing Limited
Megahertz Communications Limited
Morrison Hotel Music Ltd.
Origin C&P Limited
Pageant Music Ltd.
Paragon Publicity & Public Relations Ltd.
Plazastreet Limited
Producer Services Holding Limited
Pyecam Company Limited
Really Useful Holdings Ltd.
Rolegram Ltd.
Spencer Davis Music Ltd.
Teletext Holdings Limited
Tiger Music Ltd.
Vision Videolabel Ltd.
Working Title TV Limited
Alliance/IT, L.L.C.
Standard Amateur Radio Products, Inc.

Cellularvision Technology & Telecommunications L.P.
Computer Access Technology Corporation
Def Jam Records, Inc.
Electronic Ballast Technology, Inc.
EBT, Inc.
Grundig Business Systems Inc.
Gramercy Pictures
Great Entertainment Merchandise, Inc.
Grundig Business Systems, Inc.
Interscope Communications, Inc.
London Music
London Publishing
London Records
Mepcopal
Metropolitan Entertainment Co., Inc.
Navigation Technologies Corporation
OptImage Interactive Services Company, L.P.
PolyGram/Philips Media Game, Inc.
Rush Associated Labels Recordings
Songs of London
Standard Communications Corp.
WCLP L.P.
Philips Consumer Products Yugoslavia, Trade Company with Limited Liability

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GLOEILAMPENFABRIEKEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
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FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents U.S. Philips Corporation, North American Philips Corporation (now known as Philips Electronics North America Corporation) and N.V. Philips Gloeilampenfabrieken (now known as Philips Electronics N.V.) (collectively "Philips") respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this interlocutory appeal be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT OF THE CASE

Disputes among the parties relating to electric shavers have resulted in the filing of four federal actions — three of which are relevant here. The first case, "*Windmere*," was filed in 1984 in the Southern District of Florida by Philips alleging patent infringement against Petitioner and its customer, Windmere, and unfair competition against Windmere. Windmere, but not Petitioner, responded with a multiple count antitrust counterclaim. *Windmere* is relevant here because of Petitioner's success in avoiding separate trials on the patent and antitrust claims by representing to the

Windmere court that those claims were inextricably intertwined.

The second case, "*Sears*," in which this appeal arose, was brought by Philips in 1985 in the Northern District of Illinois against Petitioner and its customer, Sears Roebuck & Co. Petitioner filed antitrust counterclaims virtually identical to those filed by Windmere in Florida, and Petitioner then repeatedly ignored the direction of the district court that, in the interests of fairness and judicial economy, Petitioner file its counterclaims with the identical claims being tried in *Windmere*.

The third case, "*Windmere II*," was filed by Petitioner against Philips and Windmere in 1994 in the Southern District of Florida. *Windmere II* is relevant here because Petitioner's complaint alleges — directly contrary to Petitioner's representations to the court in *Sears* — that Petitioner filed its counterclaims in *Sears* only because of an agreement with Windmere to share in any recovery Windmere might receive on its counterclaims *provided* Petitioner filed its counterclaims in *Sears* and not in *Windmere*.

A. Petitioner's First Misrepresentation.

In *Windmere*, Petitioner represented to the district court that the antitrust claims — admittedly identical to those asserted below[1] — and the patent claim required "duplicate proof and witnesses" (App. B, 7), that the antitrust allegations "to a significant degree" encompass the patent issues (App. B, 7), and that the patent and antitrust issues

---

[1] Petitioner's brief below referred to its counterclaims as bearing "significant resemblance[]" to the counterclaims in *Windmere*. (Respondents' Appendix, appended hereto, ("App.") A, 2.)

"do, in fact, overlap" (App. B, 9). As a result of these representations, Petitioner successfully defended Philips' effort to have separate trials on Philips' claims and Windmere's antitrust counterclaims.

In proceedings below, however, Petitioner made precisely the opposite representation. In an attempt to avoid its counterclaims in *Sears* from being deemed compulsory to Philips' patent claim in *Windmere*, Petitioner represented that "[p]lainly, the patent and antitrust claims raise different factual and legal issues" (App. A, 3), that the two claims lack any "logical relationship" (App. A, 3), and that the claims "are almost entirely distinct" (App. A, 4).

B. Petitioner's Second Misrepresentation.

Petitioner's second relevant misrepresentation concerns *why* it brought its antitrust counterclaims in *Sears* rather than in the previously filed *Windmere* case. Petitioner represented to the district court in *Sears* that Petitioner brought its antitrust counterclaims in that case rather than in *Windmere* because *Windmere* "was a very small lawsuit . . . . [and *Sears*] is substantial . . . ." (App. C, 13.) Petitioner also addressed the lower court's concern that Petitioner was seeking "a second bite at the apple" by repeatedly assuring the court that Petitioner "had no participation, financially or otherwise, in the litigation of Windmere's antitrust claims" (App. D, 15), that Petitioner "would not have received any of the proceeds of any judgment won by Windmere" (App. E, 18), and that "only Windmere would have received any monetary award" on Windmere's counterclaims (App. F, 20-21 n.13; App. G, 24 n.12).

In *Windmere II*, however, Petitioner seeks recovery from Windmere on the very financial interest in Windmere's antitrust counterclaims which Petitioner told the court in *Sears* it never had. According to Petitioner's complaint:

> In 1985 . . . [Petitioner] approached Defendant Friedson [CEO of Windmere] to discuss [Petitioner] joining in Windmere's antitrust counterclaims against Philips in Florida. Friedson told [Petitioner] that Windmere did not want [Petitioner] to assert antitrust counterclaims in the Florida action. Friedson explained that Windmere was concerned about the effect of anti-Japanese bias on the jury trial of the antitrust counterclaims . . . . In 1985, Friedson made an oral promise to [Petitioner] that if [Petitioner] did not add its antitrust counterclaim to the Florida action . . . Windmere would share with [Petitioner] any substantial payment Windmere received from Philips as a result of its antitrust counterclaims . . . .
>
> But for [Windmere's] promise[], [Petitioner] would have added its antitrust counterclaims to the Florida action.

(App. H, 28.)

Thus in *Windmere II*, Petitioner sues to recover on its financial interest in Windmere's counterclaims arising from a *1985* agreement; yet in *1986* Petitioner assured the district court in *Sears* that Petitioner had "no participation, financially or otherwise" in Windmere's counterclaims, and that Petitioner "would not have received any of the proceeds of any judgment won by Windmere."[2]

---

[2] As recently as 1994 Petitioner told the court of appeals that the lower court was "mistaken" and had made "unsupported assumptions" about Petitioner's interest in Windmere's counterclaims. (App. A, 5 & n.15.) Petitioner also represented that "Windmere was the only party that received a monetary benefit" from Windmere's award (App. A, 5) (continued...)

C. The Opinion Below.

The court below addressed the question certified in this interlocutory appeal — whether Petitioner's counterclaims were barred — by reasoning that Petitioner had already, in effect, admitted that the counterclaims were compulsory and obtained an advantage by doing so in *Windmere*. Consequently, the court ruled that Petitioner could not abandon its representation in *Windmere* and then prevail in *Sears* by making precisely the opposite representation.

The court recognized that Petitioner's representation in *Windmere* that the patent claim and antitrust counterclaims require "duplicate proof," to a "significant degree" encompass the same issues, and that the claims "do, in fact, overlap" are directly relevant to whether Petitioner's counterclaims are compulsory under Fed. R. Civ. P. 13(a). Rule 13(a) examines whether the two claims at issue are logically related. *See Warshawsky & Co.* v. *Aracata Nat'l Corp.*, 552 F.2d 1257, 1261-63 (7th Cir. 1977). The court below merely ruled that Petitioner could not prevail in both *Windmere* and *Sears* by making irreconcilably conflicting

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[2](...continued)
while never disclosing to the court that in 1985 Petitioner had entered into a deal to share in that award. Petitioner had no explanation for these irreconcilable inconsistencies when questioned about them in oral argument below. Petitioner has continued its pattern of obfuscation by suggesting in its Petition that its antitrust counterclaims were filed in *Sears* because Petitioner was "[f]aced with the second lawsuit by Philips." (Pet. at 5.) Petitioner's complaint in *Windmere II* asserts to the contrary that Petitioner's counterclaims would have been asserted in *Windmere* "but for" Petitioner's deal to share in Windmere's recovery.

representations regarding the relationship among the patent and antitrust claims.

The court below also cited the fact that the same antitrust claims Petitioner sought to reassert were being tried in *Windmere*, that Petitioner could have asserted its claims there (but for its deal with Windmere, which Petitioner denied in *Sears* and first revealed in *Windmere II*), and that Petitioner ignored the *Sears* court's direction that Petitioner assert its claims in *Windmere*, (Petitioner's Appendix ("Pet. App.") A, 6a). Thus, the court ruled that

> [Petitioner's] interest in these counterclaims was indeed required to be raised by [Petitioner] in [*Windmere*] in which the counterclaims were already being litigated. [Petitioner] does not have the absolute right to litigate the same claims in [*Sears*], having voluntarily removed itself from the [*Windmere*] litigation of these claims, and having declined to comply with the [*Sears*] court's admonition to seek to reenter that litigation.

(Pet. App. A, 6a.)

There can be no dispute about the lower court's finding that Petitioner "played fast and loose with the courts." (Pet. App. A, 9a.)

REASONS FOR DENYING THE WRIT

SUMMARY

Petitioner ignores a simple, crucial and long-standing legal principle: the courts have inherent authority to deal with litigants' misrepresentations — including by dismissal of a claim — regardless of the particular basis for invoking the court's jurisdiction. Thus, the first question presented — whether the court had jurisdiction under 28 U.S.C. § 1292(b)

to invoke judicial estoppel — is irrelevant to the result below. Regardless of whether authority exists under § 1292(b), the court had inherent authority to prevent Petitioner from gaining an advantage by misrepresenting facts to the court. The lower courts' ability to protect the integrity of the judicial process does not stem solely from the statutory basis under which jurisdiction is invoked, but also from the courts' historical inherent powers to dispense justice.

As suggested above, this case bears no relationship to *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, __ U.S. __, 115 S. Ct. 1998 (1995). In *Yamaha*, the court of appeals resolved a certified appeal on choice of law grounds although the certified question raised a completely different issue — the measure of damages under maritime law. Here, the court of appeals answered the question certified — whether Petitioner's counterclaims were barred — although it did so on legal grounds different from, but related to, those chosen by the trial court. The question in *Yamaha* — whether the court may dispose of a certified appeal on grounds not within the certified question — is not implicated here. Unlike in *Yamaha*, the court below answered the certified question by examining Petitioner's factual representations about whether its counterclaims were compulsory — the precise issue certified — and ruled that Petitioner could not disavow its prior admission that the patent and antitrust claims were related.

Petitioner exaggerates the purported "inconsistency" among the courts in employing judicial estoppel. Indeed, lower courts are entirely consistent in the factors they consider when analyzing judicial estoppel, and Petitioner has manufactured discrepancies by comparing decisions which essentially apply the same legal analysis to diverse factual situations. Moreover, this would be an inappropriate case in which to resolve any alleged inconsistencies because all essential factors examined by the courts in applying judicial

estoppel are present here. It would be meaningless for this Court to affirm the result below, but hold that the lower court was not required to evaluate all the factors it did.

I. PETITIONER'S EFFORT TO DEPRIVE THE COURTS IN CERTIFIED APPEALS OF THEIR INHERENT AUTHORITY TO PROTECT THE INTEGRITY OF JUDICIAL PROCEEDINGS SHOULD BE REJECTED.

At base, the first question presented is irrelevant. Regardless of whether the court had authority under § 1292(b) to invoke judicial estoppel, it had the inherent authority to do so to prevent abuse of the judicial system. Petitioner's invitation to prohibit the courts of appeals from dealing with a litigant's duplicity merely because the appeal arose under § 1292(b) should be declined.

The principle embraced by the court below — that a litigant should not be free to make one representation to its advantage in one litigation and then repudiate it to gain an advantage in another — can be traced to early Germanic and Anglo-Saxon law. Robert W. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 Ill. L. Rev. of N.W. Univ. 41, 45 (1940). As courts have recognized for centuries, the principle is central both to the integrity of the judicial system and to basic notions of fairness.

This Court has long recognized that courts enjoy inherent powers necessary to the "orderly and expeditious disposition of cases" regardless of the statutory basis for jurisdiction. *See Link* v. *Wabash R.R.*, 370 U.S. 626, 630-31 (1962). The Court recently observed that among these inherent powers is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a

lawsuit . . . is within the court's discretion." *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 44-45 (1991); *see also Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944):

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

See also United States v. *Shotwell Mfg. Co.*, 355 U.S. 233, 240-41 (1957); *Communist Party of the U.S.* v. *Subversive Activities Control Bd.*, 351 U.S. 115, 124-25 (1956).

It is for these very reasons, long a part of judicial tradition, that this Court should not accept Petitioner's invitation to deprive the courts of appeals of the inherent authority to invoke judicial estoppel or employ similar means on interlocutory appeals.

II. UNLIKE THE COURT IN *YAMAHA*, THE COURT BELOW ANSWERED THE CERTIFIED QUESTION BY RELYING ON GROUNDS SQUARELY PRESENTED WITHIN THE QUESTION. *YAMAHA* IS INAPPOSITE.

The court below answered the certified question — whether Petitioner's counterclaims were barred — although on a different but related legal theory than that chosen by the trial court. Judicial estoppel was invoked below to prevent Petitioner from prevailing in two proceedings by making irreconcilable statements of fact that went directly to the question before the court — whether the antitrust counterclaims were compulsory.

Yamaha is inapposite because the court in *Yamaha* never answered the certified question, but resolved the appeal on a wholly distinct legal issue. The issue granted certiorari in *Yamaha* — whether the courts of appeals may "exercise jurisdiction over any question that is within the order that contains the controlling question of law identified by the District Court" — is not implicated here. *See Yamaha*, __ U.S. at __, 115 S. Ct. at 1998.

In briefing below, Philips first argued in great detail that Petitioner had already alleged in *Windmere* — and gained an advantage by doing so — that the patent and antitrust claims were intertwined and that, having done so, Petitioner should not be permitted to avoid the compulsory counterclaim rule by representing precisely the opposite in *Sears*. (*See* App. I, 31-34.) Petitioner's reply brief below devoted significant effort to attempting to explain its conflicting representations and its admissions in *Windmere*. (*See* App. J, 37-40.)

Thus, Petitioner's irreconcilable factual representations were briefed in detail below, *and* Petitioner's factual representations about the relationship of the patent and antitrust claims concerned precisely the critical issue encompassed by the certified question. The court below did no more than hold Petitioner to its word in *Windmere* — in effect that Petitioner's claims were compulsory — and the court did not reach out to decide a question not encompassed by the certified question. The court merely addressed an issue both parties had briefed and which went to the heart of whether Petitioner's counterclaims were compulsory.[3]

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[3] Moreover, as this Court recognized in *United States* v. *Stanley*, 483 U.S. 669, 676 (1987), appeals under § 1292(b) are "*from the order*" of the district court (emphasis added) (quoting § 1292(b)). *See id.* at 677 ("Even if the Court of

(continued...)

III. THE LOWER COURTS' APPLICATION OF JUDICIAL ESTOPPEL IS NOT IN "DISARRAY" AS PETITIONER CONTENDS.

As shown at page 9, *supra*, the doctrine of judicial estoppel, also referred to as estoppel by record, has been applied for centuries. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh and Federal Circuits agree that judicial estoppel may be invoked to prevent a party who has achieved an advantage by asserting a position in a first case from succeeding in a second case by asserting the opposite position. *Bogle* v. *Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994); *Warda* v. *Commissioner*, 15 F.3d 533, 538 (6th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 55 (1994); *Bates* v. *Long Island R.R.*, 997 F.2d 1028, 1038 (2d Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 550 (1993); *Kale* v. *Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993); *Guinness PLC* v. *Ward*, 955 F.2d 875, 899 (4th Cir. 1992); *Russell* v. *Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *Oneida Motor Freight, Inc.* v. *United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988); *Chrysler Credit Corp.* v. *Rebhan*, 842 F.2d 1257, 1261 (11th Cir. 1988); *Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 211-12 (1st Cir. 1987); *U.S. Philips Corp.* v. *Sears Roebuck & Co.*, 55 F.3d 592, 596-97 (Fed. Cir. 1995). The District of Columbia Circuit has elected not to apply judicial estoppel primarily by interpreting state law, *see, e.g., Konstantinidis*

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[3](...continued)
Appeals' jurisdiction is *not confined to the precise question certified by the lower court* (because the statute brings the 'order,' not the question, before the court), that jurisdiction *is* confined to the particular order appealed from") (first emphasis added).

v. *Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) (refusing to invoke judicial estoppel because "[n]o District of Columbia court has ever adopted the judicial estoppel doctrine"), and the Tenth Circuit's exercise of its discretion not to apply judicial estoppel has been equivocal at best, *see, e.g.*, *Guidry* v. *Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 716 (10th Cir. 1993) ("Without deciding whether the doctrine [of judicial estoppel] applies in the Tenth Circuit, we note the criteria are not satisfied"), *modified on other grounds*, 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, __ U.S. __, 115 S. Ct. 1691 (1995).

Thus, the application of judicial estoppel is not in "disarray" as Petitioner contends (Pet. at 10). While the doctrine necessarily is considered in diverse factual circumstances, some involving more egregious conduct than others, there is uniform agreement repeatedly reinforced by this Court that a litigant's duplicity or fraud may be sanctioned by judicial estoppel or otherwise under the court's power to manage its cases and achieve justice. *See, e.g.*, *Chambers*, 501 U.S. at 35 (inherent power of the court to sanction bad faith conduct); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980) (dismissal of lawsuit within court's inherent power for abuse of judicial process); *Shotwell Mfg. Co.*, 355 U.S. at 241 (court may sanction "challenge to the integrity of the record").

Moreover, this would be an inappropriate case in which to resolve any alleged inconsistencies in the courts of appeals' application of judicial estoppel. On the facts found below, there can be no dispute that judicial estoppel was employed as it would have been under the law of virtually all circuit courts of appeals. Petitioner's representations to one court directly contradicted its assertions to others, Petitioner obtained an advantage by its assertions in *Windmere*, and it sought to disavow those assertions and represent precisely the opposite to avoid an adverse result in *Sears*. On these facts, Petitioner can hardly feign surprise that judicial estoppel was

invoked to prevent Petitioner from successfully representing to the courts whatever Petitioner deemed useful at the time, regardless of its relationship to the facts.

IV. THIS PETITION TO REVIEW AN INTERLOCUTORY APPEAL INAPPROPRIATELY SEEKS THE RESOLUTION OF DISPUTED FACTUAL ISSUES.

This Court has repeatedly held that certiorari will not be granted to review a question of fact. *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962); *National Labor Relations Bd.* v. *Hendricks County Rural Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 178, *aff'd on reh'g*, 305 U.S. 124 (1938).

Here, Petitioner takes issue with the very basic factual determinations made by the court of appeals. Petitioner disputes that it made any representations in *Windmere* about the patent and antitrust claims, and denies that those representations it did make were relevant to the factual inquiry under the compulsory counterclaim rule (Pet. at 14). The court below resolved these issues against Petitioner by relying on abundant record evidence, and certiorari should not be granted to resolve these and other factual disputes raised by Petitioner.

This also is not the extraordinary case in which certiorari should be granted to review an interlocutory appeal. *See Virginia Military Inst.* v. *United States*, __ U.S. __, 113 S. Ct. 2431, 2432 (1993); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *American Constr. Co.* v. *Jacksonville T&K Ry.*, 148 U.S. 372, 378, 384 (1893).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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